

Sir Joseph Alston, Bar.
Dame Eliz. Alston, Wid. Appellants.

The Appellants CASE.

Maria Alston, Wid.
Anna Alston,
Clara Alston,
Margareta Alston,
Martha Alston,
Rebecca Maria Alston, Respondents.

March 17. 1684.

SIR Joseph Alston, the Appellant Sir Joseph's Grandfather, by his last Will in writing, dated March 17. 1684. gave 100l. to his Grandson Joseph, and to his other Grandchildren (Children of his younger Son Edward Alston, then living) 200l. apiece, payable to the Sons at 21, and to the Daughters at 18, or days of Marriage, with Interest, if his Executors put the said Money out at Interest; and that such of them as were of suitable Age, should be plac'd out Apprentices, or to some other fitting Employments: And if any of them dy'd before their respective Ages or days of Marriage, then Parts to be divided amongst the Survivors: And also devised several Lease-hold Houses to his Son Joseph and others, and directs he should pay, out of his own Estate, the Ground-rent due for the said Houses, it amounting to 248l. per Ann. And that the Rents of the House wherein Sir Jeremy Snow lived, who paid him for the same 28l. per Ann. and the Rent of the House in Mr. Story's Possession, who paid him for the same 80l. per Ann. should be paid by his Executors to his said Son Edward during his Life, and after his decease, that his Executors should out of the Rents of the said Premises pay his said Son Edward's Wife, the Respondent Mary Alston, Widow, One third part of the Clear yearly Profits thereof, so long as she kept her self a Widow, and the Surplusage of all the Rents thereof, and likewise the whole Rents thereof, after the determination of her Widowhood, to be paid to all the younger Sons and Daughters of his said Son Edward; and made his said Son Joseph and Isaac Executors, and dies in May, 1688. Isaac dies in 1689. Sir Joseph, the surviving Executor, dy'd in 1689. made his Will, and the Appellants Executors Edward Alston, the Father, dy'd in May, 1699. and after making his said Father's Will (as *supra*) had nine Children, viz. the said Joseph, John, James, Elizabeth, Ann, Clare, Mary and Catherine, and had afterwards born Martha and Rebecca Maria, Catherine and Mary the Testator, John and James dy'd after the Testator, but before they attain'd their respective Ages of 21 Years, Elizabeth attain'd her Age of 18 Years, and by Will gave her 200l. Legacy to Martha and Rebecca Maria; so there is only 1200l. Principal Money of the Legacies in question. The now Respondents, and then Complainants, exhibited their Bill in Chancery against the now Appellants, for their said Legacies with Interest. The Appellants, by Answer, admit Assets to pay the Legacies, and that 800l. had been by them receiv'd, in part of Money due to the Testator on a Mortgage of 2000l. mention'd in the Bill; and say, that the remaining 1200l. they are ready to assign over, subject to the Direction of the Court and the Testator's Will, and submit to pay Interest at 5l. per Cent.

Note. This Answer was gain'd by Surprise; and in truth was an Imposition upon the Appellants, for that the Appellant, Dame Elizabeth, never was inform'd, nor ever apprehended that any Bill was filed against her, nor that the Parchment Writing tender'd to her, was to be an Answer to any Bill, but an Instrument to assign what Trust or Interest was vested in her for the Respondents; the Fact, as to this being, That a Sunday, which was on or about the 16th day of June, in the Year 1689. one Mr. Smith, and the said Edward Alston the Father, came to her at Bradwell, in the County of Bucks, which is 44 Miles from London, and tender'd an Instrument in Writing to be sign'd by her, and told her, It was only to discharge her of the Trust reposed in her, in relation to old Sir Joseph, the Testator's Will, and then she should have no more trouble therein, or to that effect; upon which she sign'd the same Writing, which is now insisted on to be her Answer before-mentioned, and to have been taken by Commission; but does not remember, or believe, that any Oath was administred to her upon it.

The Appellant Sir Joseph's said Answer, was taken by the same Commission in London, which is irregular, as likewise the taking the other Answer on a Sunday. Besides, the Commission bears date the 15th day of June, 1689. and the Caption of the Appellant, Dame Elizabeth's Answer, appears to be the 16th day of June, 1689. which is very improbable, because of the great distance from London.

Bill. Term. Edward dy'd about the Month of May, 1699.

2dly. There are two Names sign'd to the Return of the Caption, viz. Whitaker and Edw. North; whereas the said North is ready to depose, That he never sign'd the said Return, nor took any Answer from the Appellants. And the Appellant, Dame Elizabeth, had the more reason to believe, that she had only sign'd such an Assignment as afore-said, for that there never was any Proceeding upon that as an Answer, nor did either of the Appellants hear any thing more of it for above ten Years after: And then, in Easter Term, 1703. the said Edward the Father having been dead some Years, the Respondents Exhibited a new Bill against the Appellants for their said Legacies and Interest, taking no notice therein, that there was any former Cause in relation thereto, nor any such Answers as are now insisted on, tho' the said Respondents, especially the said Respondent Mary the Mother, were acquainted with the said former Bill and pretended Answers.

Account Stated.

That by the second Bill it was alledg'd, That the Appellant Sir Joseph, had Stated with the Respondents an Account of Interest for the said Legacies, by a Note under his Hand, tho' no Account was ever stated between them.

The Fact was, Sir Joseph and some of the Respondents discoursing of the Payments he made them, and differing in their Computation, he desired the Respondent Mary to tell him the Sums she allow'd to be paid, and taking a little piece of loose Paper, he set down the Sums she dictated, and the Appellant Sir Joseph insinuating he had paid more, upon this Difference they parted, and the Paper was left as insignificant, being neither dated nor sign'd, nor ever intended for any settled Account.

Cross Bill.

The Appellants Exhibited their Cross Bill, for an Account of the Monies paid towards the said Legacies, and to be reliev'd against the Respondents Demands and to have an Allowance for the Ground-Rent for the said Houses, which the Appellant Sir Joseph had paid in his own wrong, the Respondents by the said Demise being (as was apprehended) intitled but to the Clear Rents on what was over and above the Ground-Rent, and that Sir Joseph was not oblig'd, by the said Testator's Will, to pay the Ground-Rent for them out of his own Estate.

The Respondents put in their Answer much to the effect of their Bill, but no Proof was made in either of the said Causes, that any of the Monies devised by the said Will had been put out at Interest by the Executors, nor any of his Personal Estate, save 300l. lent the said Edward Alston the Father, great part whereof was lost; and as to the said Mortgage for 2000l. the Money was lent out by the said Testator, and had it been intended, its presum'd it would have been so express in the Testator's Will.

These Causes came on to be heard before his Honour the Master of the Rolls, March 4. 1704.

The Appellant, Dame Elizabeth, having at the Hearing complain'd of the Surprise, the Court, by reason of the length of time, did not think fit to do any thing therein; but, its humbly hop'd, that the length of time shall not be Conclusive in this Case.

The said Decree was made absolute against the Appellants: Sir Joseph and the Master proceeded to take an Account; and afterwards reported 1078l. 18s. 10d. due to the Respondents; which Report has been since Confirm'd, and the Decree Inroll'd.

Cause as to the Ground-Rents.

Notwithstanding which, the Appellants humbly hope, That the said Decree shall be revers'd, for the Reasons following: It is humbly conceiv'd, That no Ground rent is to be paid or allow'd for Snow and Story's Houses, for that these Houses were not devised to the Appellant Sir Joseph's Father; and when the Testator saith, The third part of the Clear yearly Profits, which must be intended after Ground-rents clear'd, otherwise they cannot be said Clear Profits, they can't properly be called Clear, till the Yearly Payment, wherewith they stand Chargeable are deducted and according to this Construction (which seems very natural) as to the Ground-rents of these two Houses, the said Respondent Mary and her Husband Edward, receiving the whole Profit, and throwing the Ground-rents upon the Appellant Sir Joseph to Pay, She ought to Account for and Pay the said Ground-rents to him.

Objection.

There is a Clause in the Testators Will, that all his Houses in or near George-Yard and Lombard-Street that I have before given, and hereafter do give the same, shall be Freed and Discharged of all Ground-rents, Payable for the same by my Son Joseph.

Respond.

It is Conceiv'd that this Clause Extends not to Snow and Story's Houses, for these two Houses are not given to any Person by the Testators Will, the Executors are appointed only as Trustees for the Payment of the third part of the Clear Yearly Profits, and certainly the Ground-rent thereof is to be by them deducted, and then what remains is Clear Profits.

Wherefore, whereas the Decree is that the Appellants shall Pay the Arrears of the said Ground-rents, and the growing Payments thereof has no Foundation in the Testators Will, but is Groundless, and ought to be Revers'd.

Especially if the Case be, taken upon the Marriage-Settlement which was, Anno 1666. the said Sir Joseph Appellant, Sir Joseph's Grandfather, upon the Marriage of his Son Joseph (the Appellant Sir Joseph's Father) with the other Appellant Elizabeth, in Consideration of 3000l. Portion and other Valuable Consideration, did Convey, Assign and set over unto Maurice Thompson Esq. and Sir Edward Alston, Trustees therein named in trust for his Son Joseph aforesaid, and the Appellant Elizabeth, all his Leasehold Messuages in or near George-Yard, and Lombard-Street, wherein he then dwelt, with all the Warehouses thereunto belonging, in Trust for them and the Issue of their Bodies, whereby after the Decease of Old Sir Joseph, and his Son Sir Joseph the Appellant, Sir Joseph Alston, ought to Receive the Profits thereof, but the said Settlement was concealed from the Appellants, till some small time before the first Decree.

Note.

That the said Messuage and Warehouses stood all over George-Yard and in Lombard-Street, and were Burnt down in the Fire of London, and Old Sir Joseph renew'd the Lease according to the Act of Parliament for Rebuilding London, and Built several New Houses thereupon, Subject to the said Trusts, but Snow and Story's Houses were Built on a Toft near Adjoyning, by a distinct Lease, and under a distinct Title, the Appellant Sir Joseph not being Conifant of the Limitations of such Settlement paid all the Ground-rent, and suffered the Houses devised to be enjoyed by the Devisees for 14 or 15 Years, Amounting to 1300l. or thereabouts; but then upon such Discovery stop Payment.

The Appellants in their Cross Bill, set forth the Settlement and Trust, and Suggest, that upon Discovery of such Settlement they order the Rents to be stop'd in the Tenants Hands, and Pray a discovery what Rents the then Defendants (now Respondents) have received, and the Yearly Value of all the Houses.

To this they Answer:

Now the Charge of the Cross Bill as to the Settlement was never taken notice of in the Order to the said Master, nor in his Report, nor in the Decree but the said Cross Bill was dismiss'd.

It is humbly Conceiv'd there ought to have been a Tryal at Law directed to have proved the said Settlement, and then to resort back to the Court to have Accounts and Allowances stated upon the whole, by which it would appear that Sir Joseph the Grandfather had no Power to make any Devisees of the Houses in George-Yard, or of the Rents thereof, or to shift the Ground Rents of one House to another, or to oblige his Son Joseph to Pay the whole Ground-rents, and free the said Houses from Payment thereof, but the said Houses by virtue of the said Settlement ought to stand Charged with the Ground-rent reserv'd upon the Original Lease, and no other; or at least there in that part of the Decree, as to the Ground-rents, there ought to have been a saving of the Rights and Interest of the Appellants Precedent to the said Testators last Will. But by this Decree the Appellant will be bound up and foreclosed from Calling the Respondents to Account or ever to recover their Right to the said Promises, which is very hard (the Second Marriage Settlement being made upon very weighty and Valuable Considerations.)

For which reason the said Decree ought to be wholly revers'd.

Sam. Carter.